



Clause 4.6 Exceptions to Development Standards Variation (Clause 4.3 – Height of Buildings)

Address: 30A Addison Road Manly NSW

1. Background

This submission is prepared pursuant to Clause 4.6 of *Manly Local Environmental Plan ('MLEP') 2013* and seeks a variation to the Building Height development standard.

The proposal involves the demolition of an existing single dwelling and detached garage, construction of a new part single dwelling and associated landscaping.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline *Varying development standards: A Guide, August 2011*, and the NSW Department of Planning and Environment (DPE) Planning Circular *Varying Development Standards PS 18-003*.

From the Planning Circular *Varying Development Standards PS 18-003*

Assumed concurrence conditions

Numerical and non-numerical development standards

The Secretary's concurrence may not be assumed by a delegate of council if:

- the development contravenes a numerical standard by greater than 10%; or*
- the variation is to a non-numerical standard.*

...In all other circumstances, delegates of a consent authority may assume the Secretary's concurrence in accordance with the attached written notice.

The development standard proposed to be varied is a numerical Control and is <10% thus the Local Council being the Consent Authority may assume that they hold the concurrence of the Secretary and have the necessary authority to approve the variation sought herewith.

2. Description of the planning instrument, development standard and proposed variation

2.1 What is the name of the environmental planning instrument that applies to the land?

Manly Council Local Environment Plan 2013 (MLEP2013).

2.2 What is the zoning of the land?

The zoning of the land that is the subject of the development application is *C4 Environmental Living*.

2.3 What are the objectives of the zone?

The objectives of the *C4 Environmental Living* zone are:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

2.4 What is the development standard being varied?

The development standard being varied is the maximum building height development standard Clause 4.3.

2.5 Is the development standard a performance-based control?

No. The building height development standard is a numerical control.

2.6 Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 of the MLEP 2013.

2.7 What are the objectives of the development standard?

The objectives of clause 4.3 are:

- (a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) to control the bulk and scale of buildings,*
- (c) to minimise disruption to the following—*

- (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
- (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
- (iii) views between public spaces (including the harbour and foreshores),*
- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3 of the MLEP 2013 establishes a maximum building height control of **8.5 m** for the site as shown on the Height of Buildings Map tile HOB_004.

2.9 What is proposed numeric value of the development standard in your development application?

The proposed maximum height for the dwelling is 9.2 m. This equates to a numerical non-compliance of **700 mm**.

2.10 What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage breach is $700/8500 = 8.2\%$.

3. Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to Development Standards provides the methodology for varying development standards applying under a local environmental plan.

Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

In addition, the 4.6(4)(i) requires that development consent must not be granted for a development that contravenes a development standard unless the:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3),

An assessment and justification of the building height variation is provided hereunder in accordance the requirements of Clause 4.6. In addition, this variation has also been prepared in accordance with the Guidelines, which identifies matters to be addressed in an application to vary a development standard. The matters identified in the Guideline are consistent with the SEPP 1 objection principles identified in *Winten v North Sydney Council* outlined below:

1. Is the planning control in question a development standard;

2. What is the underlying object or purpose of the standard;

3. Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act 1979;

- 4. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*
- 5. Is a development which complies with the development standard unreasonable or unnecessary; and*
- 6. Is the objection well founded.*

In accordance with the Guideline, the assessment also addresses the ‘five-part test’ established by the NSW Land and Environment Court. The five-part test was established in *Wehbe V Pittwater [2007] NSW LEC 827* to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- 1. Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives¹;*
- 2. Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary;*
- 3. Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
- 4. Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or*
- 5. Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.*

¹ Note – the Planning Principle references the previous EP&A Act 1979. This Application has considered the amended Act for which the relevant Objects are now to be found at s.1.3.

3.2 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The provision of strict numerical compliance would be unreasonable due to the following:

1. Despite the noncompliance with the height control the proposal is consistent with the objectives of the *C4 Environmental Living* zone, as demonstrated in the assessment of the objectives below:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

The proposal is for a new single dwelling to replace an existing single dwelling of similar height, bulk and scale; it essentially replaces a degraded single dwelling sited largely within the existing footprint.

The proposal is consistent with Objective 1.

- *To ensure that residential development does not have an adverse effect on those values.*

The minor breach of the height control has no discernible adverse impact upon the values set out in Objective 1.

- *To protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.*

There is no impact upon tree canopies. The minor breach of the height control does not cause the building to dominate the foreshore, noting that the building is lower than the building it replaces. The proposal is not in conflict with Objective 3.

- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

There is no impact upon nearby foreshores, nor the natural environment. There is no loss of natural vegetation caused the height of the dwelling. The proposal is not in conflict with Objective 4.

- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*

The building height has no impact upon these criteria. The proposal is not in conflict with Objective 5.

- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

The overall building height is consistent with the surrounding 'built form' development pattern and slightly lower than the building it replaces. It is for a low density residential use and there is no change to the existing land use. Existing vegetation is minimal and potential impacts are inconsequential. The proposal is not in conflict with Objective 5.

2. The proposal remains consistent with the objectives of the building height standard outlined in subclause 4.3 despite the non-compliance, as is demonstrated below:

- (a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

The proposed building adopts a low-profile flat roof form with an extended overhang over the balcony at the upper level, which is the offending component for the breach in the overall roof height. The roof form and building height closely follows and is informed by the challenging site topography. There is no direct presentation to the streetscape of Addison Road, and the presentation to the public foreshore of Little Manly Cove is not appreciably different in bulk, scale or architectural style to its immediate neighbours, particularly the

more modern infill development that is evident in close proximity to the subject site. The modest breach in the overall height imposes no additional impacts upon the environmental capacity of the land. Objective (a) is satisfied.

(b) to control the bulk and scale of buildings.

The modest breach in a small section of the roof overhang does not fundamentally alter the building's bulk and scale. Objective (b) is satisfied.

(c) to minimise disruption to the following—

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

The modest breach in a small section of the roof overhang is highly unlikely to be discernible from the public vantage point in Little Manly Cove. There is no conflict with Objective (c)(i).

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

The modest breach in building height is highly unlikely to impact current view lines from adjoining residential development across the subject site. There is no conflict with Objective (c)(ii).

(iii) views between public spaces (including the harbour and foreshores),

Due to the location of the site upon a battleaxe lot with no presentation to Addison Road, the building height has no impact upon views between public spaces. There is no conflict with Objective (c)(iii).

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

The modest breach in a small section of the roof overhang at the rear of the building does not affect the solar access enjoyed by any adjoining neighbour. There is no conflict with Objective (d).

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

The height of the proposed building is directly related to the topography of the site and has taken due regard of the surrounding land uses and the relationship of the site to the surrounding sensitive environment and its presentation to Little Manly Cove. There is no conflict with Objective (e).

3.3 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act².

The objects of the Act are set down in Section 1.3(a) to (j) of which the relevant clauses are as follows:

(c) to promote the orderly and economic use and development of land,

(g) to promote good design and amenity of the built environment,

Compliance with the standard would be contrary to the objects of section 1.3 of the Act, which are to encourage development that promotes the orderly and economic use and development of land and to encourage good design and amenity in buildings.

² Now s.1.3 of the amended EP&A Act 1979

The proposal replaces an aged and dilapidated existing building with a new layout that is more environmentally efficient and provides superior accommodation. The proposal is designed to respond to the opportunities and constraints of the site in an orderly and economic manner.

It should also be noted and recognized that the problematic site topography imposes considerable design challenges which necessitate balancing choices between complying with numerical planning controls, meeting the Zone objectives and achieving a reasonably cohesive floorplan that meets accessibility requirements for the occupants whilst simultaneously limiting environmental impacts upon neighbours and the public realm.

Strict compliance with the development standard would not provide a measurable public benefit, nor is it required in order to achieve compliance with the objectives.

3.4 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the building height standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The breach in the building height Control is directly related to the constraints imposed upon the design by site topography and orientation. The design solution adopted by the project architect responds appropriately to the substantial change in levels across the site with a low impact and heavily modulated and articulated dwelling form. It is also designed to present an interesting façade to the public space in Little Manly Cove and the headland of Little Manly Point.
- The area in question constitutes an extended eave overhang and is required for the proper shading of the upper balcony and to maintain the architectural form of the façade and roof. Deleting or reducing the eave overhang would compromise the amenity of the upper floor and the integrity of the architecture.
- Reducing the overall building height may consequently result in an increase to the depth of the excavation, which is an undesirable environmental outcome.

- The minor breach of the building height has no material effect upon streetscape.
- There is no material impact upon solar access, privacy or view loss for any adjoining neighbour or the public realm as a direct result of the breach in height.

3.5 Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes. In the circumstances of the case, there are sufficient planning grounds to justify contravening the development standard being:

- The proposal satisfies the objectives of the *E4 Environmental Living* zone and the objectives of the building height standards as described in Section 3.2 above;
- The non-compliance with the standard does not contribute to unacceptable adverse environmental impacts in terms of overshadowing, visual impacts or view loss;
- The variation offers opportunities to improve upon the relationship of the building to its neighbours, by adopting a built form that minimises alteration to the existing site topography and elevated location;
- The proposed non-compliance with the numerical building height control does not result in a discernible increase in the overall bulk and height of the proposed buildings when viewed from the neighbouring and surrounding area;
- The non-compliance with the standard does not result in a scale of building that is out of character with the existing or anticipated future character of the surrounding neighbourhood;
- The proposed development is generally compliant with the controls and consistent with the underlying Objectives of the *Manly Development Control Plan 2013*; and
- The development as proposed is consistent with the provisions of orderly and economic development.

3.6 Is the variation well founded?

The submission is considered to be well founded for the following reasons:

- The proposed breach of the maximum building height standard is numerically insignificant.
- The development is consistent with Council's DCP controls and there are no unreasonable amenity, density or streetscape impacts that result from the breach.
- The proposal is a practical balance between planning controls. Strict compliance would not materially change the proposal nor result in a better outcome.
- The proposal provides for: orderly and economic development of land, high quality housing and environmental protection.
- The development is consistent with the objective of Clause 4.6, to provide flexibility. The merits have been demonstrated and a better planning outcome is achieved.
- The proposal upholds the objectives of the zoning and Clause 4.3.
- The breach is <10% from the Control and Council has concurrence from the Secretary to properly assess and approve the variation

4. Conclusion

Development standards are provided as a means of achieving planning outcomes for an individual development, site or area.

The building height control is considered appropriate to the context and circumstances of the site and does not result in a scale of development that is unsympathetic with the existing or intended future character of this neighbourhood of the Northern Beaches LGA.

A development strictly complying with the numerical standard would not discernibly alter the scale of the building or improve the amenity of adjoining neighbours or the public domain.

On the contrary, if the building height was reduced this may potentially compromise other areas of the design by increasing the excavation depth on a topographically challenging site, this being an undesirable environmental outcome and contrary to the MLEP objectives.

It should be noted that the current design has been closely informed by the consultative process between the applicant and their relative experts in order to address certain site constraints; the minor breach of height is a consequence of this collaborative approach and should be supported in order to promote and encourage superior design outcomes.

This submission satisfies the provisions of cl. 4.6 of the MLEP as it has been demonstrated that compliance with the building height development standard is both unnecessary and unreasonable in the circumstances of this case and there are sufficient planning grounds to justify contravening the standard.

CLARON CONSULTING PTY LTD



Brent M Winning JP [B.Build. Hons.), GDURP, MAIB, RPIA, LREA]
Registered Planner, Building & Development Consultant, Chartered Builder

6th December 2021